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in the

**Supreme Court**

of the

**United States**

OCTOBER TERM, 1984

ARMIN GROSZ, SARA GROSZ and NAFTALI GROSZ,  
*Petitioners,*

vs.

THE CITY OF MIAMI BEACH,  
a municipal corporation,  
*Respondents.*

MARVIN SHUSTER, M.D. and  
CONGREGATION LEVI YITZCHACK-CHABAD, INC.,  
*Petitioners,*

vs.

THE CITY OF HOLLYWOOD, FLORIDA  
a municipal corporation,  
*Respondents.*

**On Writ of Certiorari  
To the United States Court of Appeals  
For the Eleventh Circuit**

**BRIEF OF THE CITY OF HOLLYWOOD, FLORIDA  
IN OPPOSITION TO CONSOLIDATED  
PETITION FOR WRIT OF CERTIORARI**

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## QUESTIONS PRESENTED FOR REVIEW

### I.

WHETHER A MUNICIPALITY MAY OCCASION INCIDENTAL RESTRICTIONS UPON THE FREE EXERCISE OF RELIGIOUS BELIEFS WITHOUT HAVING TO ADVANCE OR DEMONSTRATE A COMPELLING STATE INTEREST FOR DOING SO.

### II.

WHETHER EXISTING CASE PRECEDENT SUPPORTS A MUNICIPALITY'S RIGHT TO REGULATE BOTH THE USE AND THE CHARACTER OF BUILDINGS WITHIN RESIDENTIAL NEIGHBORHOODS EVEN WHERE SUCH REGULATIONS MAY HAVE AN INCIDENTAL IMPACT UPON FIRST AMENDMENT FREEDOMS.

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## STATEMENT OF THE CASE

### *Shuster v. City of Hollywood*

The City of Hollywood believes that it has been relegated to a more secondary role in this litigation, given the relative treatment which Petitioners have given to the City of Miami Beach/City of Hollywood cases, and the manner of resolution of the two appeals before the Eleventh Circuit Court of Appeals. Much of Petitioner's statement of the case and virtually all of Point I deal with the Grosz claim, and not with the Shuster matter. Similarly, while the Eleventh Circuit Court of Appeals wrote a lengthy opinion in *Grosz*, the preliminary injunction was reserved in *Shuster* without an opinion, based upon the Eleventh Circuit's decision in the companion *Grosz* appeal.

While the City of Hollywood may believe that its summary treatment in this matter is well-deserved, given the nature of the claims that have been brought against the City by Dr. Shuster and Congregation Levi Yitzchack-Chabad, Inc., the City is nevertheless concerned that the Court is presently faced with the prospect of determining whether or not it will exercise jurisdiction over this cause where it has not had the benefit of a full factual summation. For this reason, the City of Hollywood believes that it would be appropriate to recount those facts which were presented by the City before the United States District Court for the Southern District of Florida and the United States Court of Appeals for the Eleventh Circuit.

Plaintiff Marvin Shuster, M.D., has been a member of the orthodox Jewish faith for the past eight years. According to the tenets of his faith, Dr. Shuster must pray twice daily with ten adult males.

In October of 1980, Dr. Shuster purchased a house located in the City of Hollywood, at 1504 Wiley Street. This area of the City is classified as an "RA" district (Appendix F, Petitioner's Brief), which is zoned for single-family buildings, parks, playgrounds, municipal buildings, golf courses and accessory buildings.

Dr. Shuster did not purchase the Wiley Street house as a residence. Rather, the house was purchased so that Dr. Shuster and ten other adult males would have a place to pray, i.e., the building was to serve as a house of worship. During the hearing on Plaintiffs' Motion for a Preliminary Injunction, counsel for Dr. Shuster and the Congregation stipulated that the inside of the house bore all of the indicia of a synagogue--a Jewish house of worship.<sup>1</sup> Houses of worship are not permitted in a RA district. (R 12)

In December of 1980, the Congregation hired a rabbi, Rabbi Tennenhaus, to perform religious services at the Wiley Street house. The Rabbi is paid \$25,000 yearly pursuant to a written contract, which was entered into in December of 1981. The Rabbi maintains an office and conducts services twice daily at the Wiley Street location. He has also conducted a bar mitzvah (a confirmation ceremony for 13 year old Jewish males) and classes on Judaic subjects at the house. The Rabbi is required to perform such functions at the house pursuant to his contract with the Congregation.

<sup>1</sup>In fact, there has never been any real doubt about the fact that this house was being operated as a house of worship. While Petitioners have denied that they were operating an organized religious center in the Grosz home, there have been no similar denials with regard to the house on Wiley Street. "In the *Shuster* case, Petitioners agree that the structure was fairly characterized as a synagogue." CONSOLIDATED PETITION FOR WRIT OF CERTIORARI, page 12 at Note 4.

On or about March 3, 1981, Dr. Shuster was served with a Notice of Violation, stating that "a church (synagogue) is not a permitted use in the RA Single-Family residential district." Plaintiffs were given five days to correct this situation. (R 13)

On March 10, 1981, Dr. Shuster applied for a Use/Density Variance "to permit a synagogue in a Single-Family residential zone." (R 55) The City granted a temporary variance for a period of six months, or until October 15, 1981.

Several months later (on July 1, 1981), Congregation Levi Yitzchack-Chabad was incorporated. A. Louis Goldfarb was named as the Congregation's President and Resident Agent. According to the Articles of Incorporation filed by the Congregation, one of the purposes of the corporation is to attract new members for the Congregation. The Congregation pays the utility bills incurred at the Wiley Street address, and has business cards which reflect that same address. The Congregation has also placed advertisements in local newspapers and a listing in the Yellow Pages of the area phone directories (under "Synagogue") which give the Wiley Street address and the telephone number of the Congregation.

During the week, religious services are conducted at the Wiley Street house twice daily, for one hour in the morning and an hour and a half in the evening. Saturday services run for three hours in the morning and two and one half hours in the evening. According to testimony which was received from the Congregation's president, approximately 10 to 15 people attend the weekly services, while 20 to 30 people generally attend on Saturdays.

According to a neighbor, there has been a increase in motor vehicle and pedestrian traffic since the Congregation began using the Wiley Street house. At the hearing on the preliminary injunction, Bruce Black testified that he had observed between 15 and 20 people at the home between 7:00 a.m. and 9:00 a.m. on weekday mornings and during the afternoon between 4:00 p.m. and 6:00 p.m. On Saturdays, Mr. Black would ordinary observe some 25 to 30 people going into the house.

Mr. Black was also able to testify concerning the fact that some 10 to 15 cars would generally be parked in the immediate vicinity when services were being conducted. In addition, cars would occasionally discharge passengers in front of the house immediately prior to services.

In Petitioners' Statement of the Case, Dr. Shuster and the Congregation note that the Wiley Street house was "used for prayer by members of Dr. Shuster's sect of Judaism who would not otherwise have been able to practice their religious beliefs." Apparently, this statement is predicated upon Petitioner's earlier pronouncements to the effect that their "religious beliefs preclude them from driving on the Sabbath, or from walking great distances on that day." (CONSOLIDATED PETITION FOR WRIT OF CERTIORARI at pages 8-9) In fact, a zoning map which was entered into evidence at the hearing on Plaintiffs' Motion For a Preliminary Injunction clearly indicated that a house of worship is a permitted use within walking distance of the house on Wiley Street.

On October of 1981, Dr. Shuster and the president of the Congregation appeared at a City Commission meeting, to request an extension of the temporary variance. Both gentlemen testified that the Congregation would be looking for other quarters. Accordingly, the City extended the variance for a period of four (4) months, or until February

15, 1982. On February 25, 1982, the City informed the Congregation that its variance had expired, and advised the Congregation that any further use of the premises at 1504 Wiley Street as a house of worship would be in violation of the Zoning and Development Code of the City of Hollywood. (R 14)

On April 6, 1982, Dr. Shuster and the Congregation filed a Complaint against the City of Hollywood and various employees or agents of the City. (R 1 through 14) (The remaining Defendants were dismissed either by order of the District Court, or by Petitioners' counsel.) At the same time, Petitioners filed a Motion for Emergency Filing of Complaint and Immediate Assignment (R 15 through 16), a Motion for Temporary Restraining Order (R 19 through 23), and Motion for Preliminary Injunction (R 29 through 38). The Motion for Temporary Restraining Order was denied on April 6, 1982 (R 64).

The hearing on the Motion for Preliminary Injunction was held on May 7, 1982. At the hearing on the Motion, counsel for Dr. Shuster and the Congregation stipulated that the president of the Congregation maintains a book which contains the names of members of the Congregation, and the names of members who have contributed to the Congregation. Petitioners' counsel also stipulated that the Congregation maintains an advertisement in the Yellow Pages of the local phone directory. The parties also stipulated to a proffer of testimony from several zoning officials for the City of Hollywood.

According to a stipulated proffer of testimony from Bob Davis, director of Growth Management for the City, the Wiley Street location was inappropriate for use as a house of worship, and had been a single-family home for approximately twenty (20) years before Dr. Shuster's

purchase. According to Mr. Davis, the lot size at 1504 Wiley Street was inappropriate for a synagogue, and the amount of available parking was grossly inadequate given the square footage of the home. City zoning standards ordinarily would have required 17 parking spaces for a house of worship which was the size of the building on Wiley Street, whereas there were only three parking spaces on Dr. Shuster's property.

The City also presented a stipulated proffer of testimony from Howard Stottlemeyer, a code enforcement officer who regularly inspects for zoning violations. According to Mr. Stottlemeyer, the City had served Notices of Violation on two other religious groups which had attempted to conduct services in homes which were within RA districts. Both groups voluntarily removed themselves from those zoning districts. Another code enforcement officer testified by proffer that he had called the telephone number listed in the Yellow Pages, and that he had been advised by the Congregation's president that dues for membership in the Congregation were \$180.00 per year, per family.

On May 12, 1982, Judge Gonzalez entered an order granting Plaintiffs' Motion for Preliminary Injunction. A Notice of Interlocutory Appeal from that Order was filed on June 11, 1982. On February 1, 1984, Judgment was entered by the United States Court of Appeals for the Eleventh Circuit, reversing the District Court's Order on the Petitioner's Motion for Preliminary Injunction, and the case was remanded to the District Court for further proceedings not inconsistent with *Grosz vs. City of Miami Beach*. Petitioners' consolidated Petition for Writ of Certiorari was timely filed after the issuance of the Eleventh Circuit's mandate.

## ARGUMENT

### POINT I

A MUNICIPALITY MAY OCCASION INCIDENTAL RESTRICTIONS UPON THE FREE EXERCISE OF RELIGIOUS BELIEFS WITHOUT HAVING TO ADVANCE OR DEMONSTRATE A COMPELLING STATE INTEREST FOR DOING SO.

The City of Hollywood has modified the initial question which was presented by Petitioners for review, in light of a somewhat different perception of the issues that have been presented in this matter since the inception of litigation. These perceptual differences have only been compounded by Petitioners' presentation in Point I, which makes no reference whatsoever to the City of Hollywood or the *Shuster* matter. Nevertheless, while it may well be that Petitioners did not intend to direct the arguments in Point I to both the City of Miami Beach and the City of Hollywood, the City of Hollywood feels compelled to respond to the arguments raised by Point I of the Consolidated Petition for Writ of Certiorari.

In that regard, the City of Hollywood would initially note that the Eleventh Circuit has never affirmed a municipality's right to prevent an individual from praying at home. Home prayer is not and has not been an issue in these consolidated actions. Rather, both cases involve a municipality's right to impose indirect "time, place and manner" restrictions upon the free exercise of religious belief as a result of the application of an otherwise non-sectarian zoning law. See *Lakewood, Ohio Congregation of Jehovah's Witnesses, Inc. vs. City of Lakewood, Ohio*, 699 F.2d 303 (6th Cir. 1983), cert. denied 104 S.Ct.72, 78 L.Ed.2d (1983).

To that extent, the Eleventh Circuit's rulings in the *Shuster* and *Grosz* actions were entirely consistent with prior case precedent emanating from this Court and the other circuit courts of appeal. Thus, while it may well be that this Court has never issued any precise pronouncements which have expressly sanctioned application of municipal zoning ordinances in such a manner as to cause some kind of indirect or incidental burden upon the free exercise of religious beliefs, review by certiorari would be unwarranted given the lack of any real conflict or confusion in this area. This opinion is buttressed by the Court's decision to deny certiorari in several similar cases.

*Sherbert vs. Verner*, 374 U.S. 398, 10 L.Ed.2d 965, 83 S.Ct. 1790 (1963), undoubtedly stands for the proposition that a governmental entity may not be allowed to *substantially burden* the free exercise of religious beliefs absent some compelling state interest. Yet *Sherbert* and its progeny certainly should not serve as a basis for an exercise of this Court's discretionary jurisdiction where there clearly has been no "substantial infringement" of the First Amendment rights of any of the Petitioners herein.

In this instance, enforcement of the City of Hollywood's zoning ordinances would in no way require Dr. Shuster or the Congregation to abandon any of the precepts of their religion. They will simply be required to relocate the synagogue several blocks away, and to walk an additional three blocks to services.<sup>2</sup> Under the circumstances, the kind of

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<sup>2</sup> In the *Grosz* case, the Eleventh Circuit noted that the City of Miami Beach's zoning regulations permitted organized, publicly attended religious activities in all zoning districts except the RS-4 single-family districts. The zones which allow organized religious activity constitute one half of the City's territory. The *Grosz* family lived within four blocks of such a district. (Appendix A to Consolidated Petition for Writ of Certiorari, at App.22.)

substantial infringement which justified the required showing of a compelling state interest in *Sherbert* is absent in this instance.

The City of Hollywood would submit that this case is more closely analogous to those decisions which have sustained governmental regulations which have had an incidental impact upon the free exercise of First Amendment freedoms. See, e.g., *Young vs. American Mini Theaters, Inc.*, 427 U.S. 50, 49 L.Ed.2d 310, 96 S.Ct. 2440 (1976); *United States vs. O'Bryan*, 391 U.S. 367, 20 L.Ed.2d 672, 88 S.Ct. 1673 (1968); *Braunfeld vs. Brown*, 366 U.S. 599, 6 L.Ed.2d 563, 81 S.Ct. 1144 (1961). The decisions in such cases indicated that a governmental entity need not demonstrate a compelling interest in the formulation or enforcement of a secular statute or ordinance where the legislative enactment in question will only incidentally burden the exercise of First Amendment rights.

In the opinion for the Court in the *Grosz* matter, Judge Goldberg reviewed all of the cases which have been cited by the parties to this matter, and concluded that it was ultimately up to the reviewing Court to strike a "proper, final balance of free exercise and government interest." (Appendix A to Consolidated Petition for Writ of Certiorari, at App. 19). This conclusion does not conflict with applicable decisions of this Court or other federal courts of appeal. To the contrary, the opinions in *Grosz* and *Shuster* are completely harmonious with similar or analogous decisions from both this Court and the other federal courts of appeal. And it certainly cannot be said that the decisions in *Grosz* and *Shuster* conflict with decisions on this issue which have emanated from the Florida Supreme Court, since the Florida Supreme Court has ruled that the City of Miami Beach has the power to regulate the location of

churches, and to otherwise preclude organized group religious activity where such activity does not fall within the parameters of that type of conduct which is allowed in zoned residential neighborhoods. *Jacquelyn Town vs. State*, 377 So.2d 648 (Fla. 1980).

It is worthy of note that this Court denied certiorari in the *Town* matter. *Town vs. Reno*, 449 U.S. 803, 66 L.Ed.2d 7, 101 S.Ct.48 (1980). That result would appear to be entirely consistent with both prior case precedent and this Court's recent decision to deny certiorari to the United States Court of Appeals, Sixth Circuit, in *Lakewood, Ohio Congregation of Jehovah's Witnesses, Inc. vs. City of Lakewood*, 699 F.2d 303 (6th Cir. 1983), cert. denied, 78 L.Ed.2d. 85, 104 S.Ct. 72 (1983). In the *Lakewood, Ohio* case, the Sixth Circuit had affirmed the constitutionality of a comprehensive municipal zoning plan which prohibited the construction of houses of worship in certain areas of the City.

This Court has rejected other similar constitutional challenges in an indirect fashion. In *Corporation of Presiding Bishop vs. City of Porterville*, 203 P.2d 823 (Cal.App.1949), a California appellate Court ruled that the City of Porterville could enforce a municipal zoning ordinance which precluded the construction of houses of worship in certain enumerated residential areas. The Plaintiffs appealed to the United States Supreme Court, which dismissed the appeal for want of a substantial Federal question. *Corporation of Presiding Bishop vs. Porterville*, 338 U.S. 805, 94 L.Ed. 487, 70 S.Ct. 78 (1949). In an opinion later that same year, the *Porterville* Court explained the basis for that dismissal:

When the effect of a statute or ordinance upon the exercise of First Amendment freedoms is relatively small and the public interest to be protected is substantial, it is obvious that a rigid test requiring a showing of imminent danger to the security of the Nation is an absurdity. We recently dismissed for want of substantiality an appeal in which a church group contended that its First Amendment rights were violated by a municipal zoning ordinance preventing the building of churches in certain residential areas. *American Communications Association vs. Douds*, 339 U.S. 382, 397, 94 L.Ed. 925, 940, 70 S.Ct. 674, 689 (1950).

Thus, on three separate occasions this Court has refused to consider challenges to municipal ordinances which regulated the location of houses of worship. If this kind of regulation fails to present a substantial Federal question, it is difficult to understand how the City of Hollywood's virtually identical zoning ordinance could be deemed to unconstitutionally abridge the First Amendment freedoms of Dr. Shuster and the Congregation, or to otherwise provide a basis for an exercise of this Court's discretionary jurisdiction.

## POINT II

EXISTING CASE PRECEDENT SUPPORTS A MUNICIPALITY'S RIGHT TO REGULATE BOTH THE USE AND THE CHARACTER OF BUILDINGS WITHIN RESIDENTIAL NEIGHBORHOODS EVEN WHERE SUCH REGULATIONS MAY HAVE AN INCIDENTAL IMPACT UPON THE FIRST AMENDMENT FREEDOMS.

The City of Hollywood has rephrased Petitioners' Point II, based predominantly upon the City's belief that even a cursory examination of the opinion in *Grosz* will readily reflect that the Court of Appeals did not determine that the Respondent Cities could exclude religious activity from residential neighborhoods based solely upon those same standards which are used to exclude commercial enterprises from residential districts. Rather, the City of Hollywood believes that both panels of the Eleventh Circuit properly applied existing precedent, which supported their attempts to balance what were perceived as substantial infringements upon existing zoning policy with what may truly be characterized as incidental "time, manner and place restrictions on religion". (Appendix A to the Consolidated Petition for Writ of Certiorari, App. 26.)

In his decision in *Grosz*, Judge Goldberg noted that this Court had previously upheld the convictions of a Jehovah's Witness for violating child labor laws. *Prince vs. Massachusetts*, 321 U.S. 158, 64 S.Ct. 438, 88 L.Ed. 645 (1944). In *Prince*, the Court held that a state's interest in protecting the welfare of its children was sufficient to allow the State of Massachusetts to wholly prohibit children from selling religious literature on city streets. However, as

was noted by Judge Goldberg, while the *Prince* Court observed that the State of Massachusetts could not completely prohibit adults from distributing religious literature, distribution of literature could be regulated "within reasonable limits" in order to accommodate the primary uses of the city streets. (Appendix A to the Consolidated Petition for Writ of Certiorari, App. 24; 321 U.S. at 169, 64 S.Ct. at 443.) Thus, there can be little doubt about the fact that this Court has previously endorsed the use of a state's police power to advance a substantial state interest, even where the net effect would be to impose "time, manner and place restrictions on religion."

Petitioners concede that the commercial uses of property can be regulated through the implementation of a general zoning scheme if a municipality's comprehensive zoning plan is designed to promote the health and well-being of municipal citizens, i.e., if the zoning ordinances are rationally related to some legitimate municipal purpose. *Euclid vs. Ambler Realty Company*, 272 U.S. 365, 71 L.Ed 303, 47 S.Ct. 114 (1926). Petitioners also concede that comprehensive zoning plans may include restrictions upon religious structures which do not conform to local zoning regulations. See *Corporation of the Presiding Bishop vs. City of Porterville*, supra, as explained in *American Communications Association v. Douds*, supra. Yet Petitioners then attempt to suggest that the Eleventh Circuit's decision in this matter is some kind of aberration, simply because Dr. Shuster did not modify or alter any of the external features of the house on Wiley Street before (or after) it was converted into a formal house of worship. The City of Hollywood believes that these are distinctions without a jurisprudential difference.

Dr. Shuster and the Congregation have misconstrued the purpose of zoning regulations. Zoning laws are not designed solely to govern the *appearance* of structures within a given district. Rather, as the Court noted in *Village of Belle Terre v. Boraas*, 416 U.S. 1, 39 L.Ed.2d 797, 94 S.Ct. 1536 (1974), single-family residential zoning may be used to preserve the "quiet seclusion" which results where the "yards are wide, people few, and motor vehicles restricted . . . ." *Village of Belle Terre*, 416 U.S. at 9. In fact, given the character of the single-family residential neighborhood, the actual appearance of neighborhood structures may often be one of the least important goals which a municipality may seek to achieve through implementation of its master zoning plan.

In his Order granting a Preliminary Injunction in favor of Dr. Shuster and the Congregation, Judge Gonzalez noted that the City of Hollywood had a substantial interest in protecting the sanctity of its residential neighborhoods, and that the City's concerns over the increase in traffic and noise in the Wiley Street neighborhood bore a rational relationship to the zoning ordinance in question. No other conclusion could have been drawn, given the substantial, increased traffic in the neighborhood as a result of services at the synagogue, and in light of the fact that the amount of available parking was grossly inadequate.

The City of Hollywood believes that it was entitled to use its zoning laws to protect the sanctity of a residential neighborhood which had existed in substantially the same condition for some 20 years prior to the purchase of the house on Wiley Street by Dr. Shuster. The City did not use its zoning authority to exclude religion *per se* from this

residential district. Rather, the City simply sought to enforce its zoning code in order to prohibit the use of a home in a residential district as a formal house of worship, where the City had previously determined that both the neighborhood and the house itself were inadequate or unsafe for that purpose, given the character of the surrounding neighborhood.

The City's decision to enforce its zoning laws was no different than the decisions which were made by the City of Porterville or the City of Lakewood when those municipalities decided to prohibit the construction of formal houses of worship in residential neighborhoods. Nor can the City of Hollywood's decision to enforce its zoning regulations be distinguished from similar efforts by the City of Miami Beach to preclude Jacquelyn Town from using her residence as a center of operations for the Ethiopian Zion Coptic Church. This Court denied certiorari in each of those instances. Certiorari should also be denied in this case.

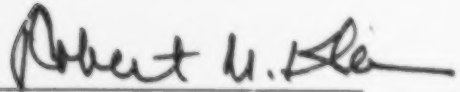
## CONCLUSION

The United States Court of Appeals for the Eleventh Circuit correctly applied existing precedent in resolving the *Grosz* and *Shuster* matters. The law in this area does not need clarification, as has been demonstrated by this Court's decision not to grant certiorari in prior, similar actions. The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing Brief in Opposition to Consolidated Petition for Writ of Certiorari was served by United States Mail, postage prepaid, to: Michel Ociacovski, Esq., Samuel I. Burstyn, P.A., Suite 200, 3050 Biscayne Boulevard, Miami, Florida 33137; and Jessee L. McCrary, Jr., Esq., Eighth Floor, 3050 Biscayne Boulevard, Miami, Florida 33137, counsel for Petitioners, on this 22<sup>nd</sup> day of June, 1984.

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